

2003 ASSEMBLY BILL 529

September 18, 2003 – Introduced by Representatives GRONEMUS, J. WOOD, BLACK, AINSWORTH, BERCEAU, POCAN, YOUNG and A. WILLIAMS, cosponsored by Senators GEORGE and RISSER. Referred to Committee on Energy and Utilities.

1 **AN ACT** *to amend* 196.64 (1), 196.64 (2) and 893.28 (2); and *to create* 20.455 (1)
2 (gm) and 196.73 of the statutes; **relating to:** remediation of objectionable flows
3 of electric current, burden of proof and damages in certain actions against
4 public utilities, making an appropriation, and providing penalties.

Analysis by the Legislative Reference Bureau

This bill prohibits electric utilities and cooperatives from causing objectionable flows of current on the property of others. The bill states that the legislature finds that objectionable flows of current are detrimental to public health, safety, and welfare and that the bill's purpose is to advance substantially the state's legitimate interest in eliminating, and providing remedies for, objectionable flows of current. "Objectionable flow of current" is defined as a steady state of load electrical current for five seconds or more on a grounding conductor or any other conductor that normally does not carry electric current. However, certain temporary flows of current that result from the performance of a grounding conductor's protective functions are excluded from the definition. A "grounding conductor" is defined as a conductor that connects the distribution system of an electric utility or cooperative to a grounding electrode or electrodes.

The bill allows a person who owns, leases, or occupies property on which an electric utility or cooperative violates the prohibition to bring an action in court to enjoin the violation and for any damages resulting from the violation. In addition, if the person prevails in the court action, the court is required to award the person attorney fees and costs. Also, if the person provided written notice to the electric

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utility or cooperative about the violation before bringing the court action, and the electric utility or cooperative failed to remedy the violation within 30 days after receiving the notice, the court must award treble the damages resulting from the violation.

In addition, the bill requires each electric utility and cooperative to remedy all problems associated with its plant or equipment that cause objectionable flows of current on the property of others. The deadline for meeting this requirement is January 1, 2012. However, if an objectionable flow of current is discovered in 2011, the electric utility or cooperative must remedy problems with plants and equipment no later than one year after the discovery. The penalty for failing to comply with the 2012 deadline is a forfeiture of between \$500,000 and \$1,000,000. The penalty for failing to remedy problems discovered in 2011 within the one-year deadline is a forfeiture of \$1,000 for each day of failure to comply.

The bill provides that an objectionable flow of current that an electric utility or provider causes on the property of another person is a trespass on that property. If a person brings an action for a preliminary injunction to enjoin the trespass, the bill provides that the person is not required to show irreparable harm for the court to grant the preliminary injunction. Under current law, a person seeking a preliminary injunction must show irreparable harm and satisfy other requirements. The bill also prohibits an electric utility or cooperative from obtaining a prescriptive right to cause, or an easement or other property interest for causing, an objectionable flow of current on the property of another person.

The bill allows a person to bring a products liability action against an electric utility or cooperative that causes an objectionable flow of current on property owned, leased, or occupied by the person. Under current law, Wisconsin courts have specified the elements that must be satisfied for a plaintiff to prevail in a products liability action. The first two elements are: 1) the product sold must be in a defective condition; and 2) the product must be unreasonably dangerous. In addition, in *Koplin v. Pioneer Power & Light Co., Inc.*, 154 Wis. 2d 487, 500 (1990), the Wisconsin Court of Appeals held that a plaintiff could not bring a products liability action against an electric utility for stray voltage. (The Wisconsin Supreme Court reversed the Court of Appeals on other grounds and did not address the products liability holding.) This bill reverses the Court of Appeals holding regarding products liability by specifying that, in a products liability action, an electric utility or cooperative that causes an objectionable flow of current on the property of another person is considered to have provided a product in a defective condition that is unreasonably dangerous. As a result, the first two elements required for a products liability action are satisfied.

Finally, the bill does all of the following:

- 1) The bill allows the attorney general to enforce the prohibition regarding objectionable flows of current and the requirements regarding the deadlines for remedying problems with plants and equipment. A court is allowed to award the attorney general prosecution expenses, including attorney fees.

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2) The bill provides that an electric utility that causes an objectionable flow of current on the property of another is considered to have violated its duty under current law to provide reasonably adequate service.

3) The bill allows a person who shows, by a preponderance of the evidence, that the person is injured by a public utility's violation of laws enforced by the Public Service Commission to collect treble the damages resulting from the injury. Under current law, treble damages are allowed only if the violation is willful, wanton, or reckless. In addition, under current law, the evidentiary standard that applies is clear and convincing evidence, which requires more evidence than the standard under the bill.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 20.455 (1) (gm) of the statutes is created to read:
2 20.455 (1) (gm) *Investigation and prosecution; objectionable flows of current.*
3 All moneys received under s. 196.73 (3) (d), for the expenses of investigation and
4 prosecution of violations of s. 196.73 (3), including attorney fees.
- 5 **SECTION 2.** 196.64 (1) of the statutes is amended to read:
6 196.64 (1) If a director, officer, employee or agent of a public utility, in the course
7 of the discharge of his or her duties, ~~willfully, wantonly or recklessly~~ does, causes or
8 permits to be done any matter, act or thing prohibited or declared to be unlawful
9 under this chapter or ch. 197, or ~~willfully, wantonly or recklessly~~ fails to do any act,
10 matter or thing required to be done under this chapter, the public utility shall be
11 liable to the person injured thereby in treble the amount of damages sustained in
12 consequence of the violation. No recovery as in this section provided shall affect a
13 recovery by the state of the penalty prescribed for such violation.
- 14 **SECTION 3.** 196.64 (2) of the statutes is amended to read:

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1 196.64 (2) The burden of proof in an action under sub. (1) rests with the person
2 injured to prove the case by ~~clear and convincing~~ a preponderance of the evidence.

3 **SECTION 4.** 196.73 of the statutes is created to read:

4 **196.73 Bill of rights for remedying objectionable flows of electric**
5 **current. (1) DEFINITIONS.** In this section:

6 (a) “Electric provider” means a public utility that furnishes electricity directly
7 or indirectly to the public or a cooperative association organized under ch. 185 for the
8 purpose of providing electric service to its members only.

9 (b) “Grounding conductor” means a conductor that connects the electrical
10 distribution system of an electric provider to a grounding electrode or electrodes.

11 (c) “Objectionable flow of current” means a steady state of load electrical
12 current for 5 seconds or more on a grounding conductor or any other conductor that
13 normally does not carry electric current, except for any temporary flow of electrical
14 fault current that is caused by a phase-to-ground fault condition and that results
15 from the performance of a grounding conductor’s protective functions regarding
16 faults or lightning.

17 **(2) FINDING AND PURPOSE.** The legislature finds that objectionable flows of
18 current are detrimental to public health, safety, and welfare, and the purpose of this
19 section is to advance substantially the state’s legitimate interest in eliminating, and
20 providing remedies for, objectionable flows of current.

21 **(3) ELECTRIC PROVIDER DUTIES.** (a) No electric provider may cause an
22 objectionable flow of current to occur on property owned, leased, or occupied by any
23 other person. For purposes of s. 196.03 (1), service by a public utility is not
24 reasonably adequate if the public utility violates this paragraph.

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1 (b) A person who owns, leases, or occupies property on which an electric
2 provider has violated par. (a) may bring an action to enjoin the violation, for damages
3 resulting from the violation, or both. If the person prevails in the action, the court
4 shall, notwithstanding s. 814.04 (1), allow reasonable attorney fees and costs to be
5 paid by the electric provider. The court shall award treble the damages resulting
6 from the violation if, before bringing the action, the person provided written notice
7 of the violation to the electric provider and the electric provider failed to remedy the
8 violation within 30 days after receiving such notice.

9 (c) 1. Except as provided in subd. 2., no later than January 1, 2012, each electric
10 provider shall remedy all problems associated with its plant or equipment that cause
11 an objectionable flow of current on property owned, leased, or occupied by a person
12 other than the electric provider.

13 2. If an objectionable flow of current is discovered in 2011 on property owned,
14 leased, or occupied by a person that receives electric service from an electric provider,
15 the electric provider shall remedy all problems associated with its plant or
16 equipment that cause the objectionable flow of current no later than one year after
17 the objectionable flow of current is discovered.

18 (d) The attorney general may bring an action to enforce this subsection and a
19 court may award the attorney general the reasonable and necessary expenses of
20 prosecution, including attorney fees, from any person who violates this subsection.
21 All moneys awarded by a court under this paragraph shall be credited to the
22 appropriation account under s. 20.455 (1) (gm).

23 **(4) PRODUCTS LIABILITY.** If an electric provider that furnishes electricity to a
24 customer or member causes an objectionable flow of current on property owned,
25 leased, or occupied by the customer or member, the electric provider is considered,

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1 for purposes of any products liability action brought by the customer or member
2 against the electric provider regarding the objectionable flow of current, to have
3 provided a product in a defective condition to the customer or member that is
4 unreasonably dangerous to the customer or member.

5 **(5) TRESPASS; OTHER PROPERTY INTERESTS.** (a) An objectionable flow of current
6 that an electric provider causes on the property of another person is a trespass on
7 that property. A person is not required to show irreparable harm for a court to issue
8 a preliminary injunction to restrain such a trespass.

9 (b) An electric provider may not obtain a prescriptive right to cause, or an
10 easement or other property interest for causing, an objectionable flow of current to
11 occur on the property of another person.

12 **(6) PENALTIES.** (a) An electric provider that violates sub. (3) (c) 2. shall be
13 required to forfeit \$1,000 for each violation. Each day of continued violation
14 constitutes a separate violation.

15 (b) An electric provider that violates sub. (3) (c) 1. shall be required to forfeit
16 not less than \$500,000 and not more than \$1,000,000. A court imposing a forfeiture
17 under this paragraph shall consider all of the following in determining the amount
18 of the forfeiture:

19 1. The appropriateness of the forfeiture to the volume of business of the electric
20 provider.

21 2. The magnitude of harm caused by the violation.

22 3. The duration of the violation.

23 **(7) OTHER REMEDIES.** The rights and remedies under this section are in addition
24 to any other rights or remedies that may exist at law or in equity.

25 **SECTION 5.** 893.28 (2) of the statutes is amended to read:

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1 893.28 (2) Continuous use of rights in real estate of another for at least 10 years
2 by a domestic corporation organized to furnish telegraph or telecommunications
3 service or transmit heat, power or electric current to the public or for public purposes,
4 or a cooperative association organized under ch. 185 to furnish telegraph or
5 telecommunications service or transmit heat, power or electric current to its
6 members, establishes the prescriptive right to continue the use, except as provided
7 by ~~s.~~ ss. 196.73 (5) (b) and 893.29. A person who has established a prescriptive right
8 under this subsection may commence an action to establish prescriptive rights under
9 ch. 843.

SECTION 6. Initial applicability.

10 (1) The treatment of section 196.64 (1) and (3) of the statutes first applies to
11 violations occurring on the effective date of this subsection.
12

13 (2) The treatment of section 196.73 (4) and (5) (a) of the statutes first applies
14 to objectionable flows of current that occur on the effective date of this subsection.

15 **(END)**